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PP v. JASNIH OT ALI

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
LEONARD DAVID SHIM JC
[CRIMINAL TRIAL NO: BKI-45SOM-5-1-2019]
8 OCTOBER 2021

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Abstract – *An accused who was charged with an offence under s. 26 of the Anti-trafficking in Persons and Anti-Smuggling of Migrants Act 2007 for smuggling a migrant must be proved to have committed any of the acts mentioned or listed in s. 2 thereof. The accused who was proved to have facilitated a migrant to travel by air from Kota Kinabalu to Kuala Lumpur, cannot however be said to have committed an offence under the Act or the section, as the migrant was proved to have been a resident in Sabah since the 1960s and had entered Malaysia on her own freewill and not smuggled in; under no account could the accused then be said to have 'smuggled the immigrant unlawfully or illegally into any part of Malaysia or out of Malaysia'.*

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CRIMINAL LAW: *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 – Section 26A – Allegation that accused carried out smuggling of Filipino and undocumented migrants – Whether elements of charge proved – Whether accused arranged, facilitated or organised for illegal or unlawful migrants/foreigners to travel by air – Whether migrants had entered into Malaysia long before arrest/detention – Whether accused let migrants pass through departure hall – Whether migrants fell under definition of s. 2 of Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 – Whether elements of actus reus and mens rea fulfilled – Whether prima facie case made out*

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The accused was originally charged under s. 26A of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 ('ATIPSOM'). The charge was then amended by two amended charges to respectively read that the accused carried out the smuggling of Filipino and undocumented migrants known as Jamilah ('first amended charge') and Fahad ('second amended charge'). The prosecution contended that (i) the accused was involved in a smuggling syndicate and the *modus operandi* of this smuggling syndicate was to arrange, facilitate or organise through their agent for illegal or unlawful migrants/foreigners to travel by air from the Kota Kinabalu International Airport ('KKIA') to Kuala Lumpur or to other towns in Sabah; (ii) the agent would arrange and work with airport security personnel, usually an auxiliary police officer and/or an immigration officer stationed at the KKIA to allow the migrant an easy passage to Kuala Lumpur or other towns in Sabah for an agreed fee; (iii) the accused was helping Jamilah to exit Kota Kinabalu, Sabah, to visit her family in Kuala Lumpur; and (iv) the accused smuggled Fahad unlawfully at the KKIA. For the first amended charge, the

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defence submitted that (i) from the evidence adduced by the prosecution, the accused never committed any of the acts mentioned in s. 2 of the ATIPSOM. In other words, there was no evidence to prove that the accused smuggled Jamilah unlawfully or illegally into any part of Malaysia or out of Malaysia either knowing or having reasons to believe that the person's entry or exit was unlawful; (ii) Jamilah's statement showed that she had entered Malaysia in the 1960s and grew up in Sabah. Therefore, Jamilah entered into Malaysia on her own free will, was not smuggled and the accused was not involved at all with Jamilah's entry into Malaysia; (iii) it was not the accused who let Jamilah pass through the Domestic Departure Hall A at the KKIA because the accused was in charge of the X-ray machine. The accused could not have checked Jamilah either when she passed through the Domestic Departure Hall A because female passengers were checked by female officers; (iv) there was reasonable doubt on whether Jamilah was a smuggled migrant as defined under s. 2 of the ATIPSOM as evidence revealed that Jamilah's second husband and daughter were both Malaysians. She may not have been Malaysian when she entered Malaysia but there was a possibility that she obtained valid documents to stay in Malaysia. For the second amended charge, the defence submitted that (i) there was no evidence to prove that the accused smuggled Fahad unlawfully or illegally into any part of Malaysia or out of Malaysia, either knowing or having reasons to believe that the person's entry or exit was unlawful; (ii) Fahad's statement showed that he had entered Malaysia in 2014 without the assistance of the accused. Hence, the accused was not involved at all with the entry of Fahad into Malaysia; and (iii) it was not the accused who let Fahad pass through the Domestic Departure Hall A because the accused was never present there. Furthermore, Fahad did not identify the accused as the auxiliary policeman who supposedly let him pass through the Domestic Departure Hall A.

Held (no *prima facie* case made out against accused; discharging and acquitting accused without calling him to enter defence):

(1) There was no evidence to show that the accused facilitated the unlawful entry of Jamilah. The evidence adduced by the prosecution showed that Jamilah entered Sabah from the Philippines in the 1960s and grew up in Sabah. Thus, Jamilah already entered and remained in Sabah, Malaysia long before the date of her detention at the KKIA. By according a plain and ordinary meaning to the words in the definition of 'smuggling of migrants' in s. 2 of the ATIPSOM, the words 'an exit from, any country' means to leave the country (Malaysia). Jamilah did not come within the definition of 'smuggling of migrants', 'smuggled migrant' or a person who was the object of the act of 'smuggling of migrants' in s. 2 of the ATIPSOM. When Jamilah was arrested, she was allegedly taking a domestic flight from the KKIA to Kuala Lumpur to visit her family and was not exiting Malaysia. Hence, one of the essential elements of the offence of smuggling of migrants that was

A arranging or facilitating to enter and/or exit Malaysia was not made out against the accused. The accused was not involved in cross-border of international smuggling. (paras 19, 21, 22 & 41)

(2) The quality of the identification purportedly made by Jamilah at the Domestic Departure Hall A was not good. Having regard to the fleeting B glance or brief encounter when Jamilah passed through the said Domestic Departure Hall A, the identification by photographs and identification parade made some 22 months later was doubtful and weak. Without being shown the accused's photograph before the identification was conducted, it was doubtful whether Jamilah would be C able to positively identify the accused. There was no pre-trial description of the accused given by Jamilah. There was also evidence that Jamilah had been shown and seen the accused's photograph before the identification parade *albeit* some uncertainty as to the exact time she was shown such photograph. The evidence obtained from such flawed D procedure would have little or no value. (para 32)

(3) The prosecution did not produce the CCTV footages recorded. Neither did the prosecution call the officers who were in charge of the CCTV recording of passengers passing through the Domestic Departure Hall A to produce the CCTV footage. The CCTV footage was an important E piece of material evidence. This failure amounted to withholding or suppression of evidence. This was a fit and proper situation to invoke an adverse inference under s. 114(g) of the Evidence Act 1950 on the non-production of the CCTV footages. In the circumstances, the inference favourable to the accused must be taken. Without the CCTV F footages being produced, the truth of the prosecution's case and the veracity of the identification evidence could not be verified. It was unsafe to convict the accused by relying on the identification by Jamilah. (paras 38 & 39)

(4) The undisputed evidence showed that there were three departure halls G at level 3 at the KKIA. Evidence showed that the accused was working at bagasi B loader on the said day and this was confirmed by the accused's shift leader. Bagasi B loader was not situated at the same place described as Domestic Departure Hall A. Therefore, the accused was not working at the Domestic Departure Hall A. There was doubt as to H the exact crime scene or place where Fahad had passed through. (para 65)

(5) The evidence showed that Fahad had entered Malaysia from the Philippines in 2014. The entry was arranged by an agent. Fahad's flight on the said day was arranged by another agent. The flight from Kota I Kinabalu, Sabah to Kuala Lumpur could not be said to be exiting Malaysia. As Fahad was not exiting Malaysia, there was no facilitating or arranging for Fahad's unlawful entry or exit from Malaysia within the

meaning of 'smuggling of migrants' in s. 2 of the ATIPSOM. Hence, the essential element or *actus reus* of the offence of smuggling of migrants, which was to arrange Fahad to enter and/or exit Malaysia was not made out against the accused. (para 71)

(6) The third essential element of the amended first and second charges was whether the accused either knowing or having reason to believe that Jamilah and Fahad's entry or exit was unlawful. This was the element of *mens rea* for the offence of smuggling of migrants under s. 26A of the ATIPSOM. The *mens rea* was not made out by the prosecution. The prosecution had not adduced credible evidence proving each ingredient of the offence of smuggling of migrants under s. 26A of the ATIPSOM. (paras 86 & 87)

Case(s) referred to:
Abdullah Atan v. PP & Other Appeals [2020] 9 CLJ 151 FC ***(refd)***
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Goi Ching Ang v. PP [1999] 1 CLJ 829 FC ***(refd)***
Heng Aik Ren Thomas v. PP [1998] 3 SLR 465 ***(refd)***
Jaafar Ali v. PP [1999] 1 CLJ 410 HC ***(refd)***
Magendran Mohan v. PP [2011] 1 CLJ 805 FC ***(refd)***
Mohamad Roslan Marjo v. PP & Other Applications [2019] 4 CLJ 648 HC ***(refd)***
PP v. Lee Eng Kooi [1993] 2 CLJ 534 HC ***(refd)***
PP v. Lopatkina Klavdiia [2017] 1 LNS 2089 HC ***(refd)***
PP v. Sumon Khan & Anor [2018] 1 LNS 1506 CA ***(refd)***
PP v. Tay Ee Hung [2016] 4 CLJ 897 HC ***(refd)***
PP v. Tin Hock Wan [2016] 6 CLJ 126 HC ***(refd)***
See Kek Chuan v. PP [2013] 6 CLJ 98 CA ***(refd)***
Tan Kim Hoo v. PP & Another Appeal [2007] 6 CLJ 557 CA ***(refd)***
Wong Soon Choon v. PP [2016] 2 CLJ 807 CA ***(refd)***

Legislation referred to:
Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007, ss. 2, 26A, 61A
Criminal Procedure Code, ss. 158, 180
Evidence Act 1950, s. 114(g)
Security Offences (Special Measures) Act 2012, s. 21

For the prosecution - Mohd Khairuddin Idris; DPP
For the accused - Hamid Ismail; M/s Hamid & Co

Reported by Lina E

JUDGMENT

Leonard David Shim JC:

[1] Jasnih bin OT Ali @ Mohd Alli (hereinafter referred to as "the accused") was charged under s. 26A of Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 ("Act 670"). The original charge (exh. P2) are as follows:

Bahawa kamu, antara Februari 2017 sehingga 24 Oktober 2018 jam lebih kurang 1715 Hrs bertempat di Lapangan Terbang Antarabangsa Kota Kinabalu ("LTAKK") Sabah, di dalam Daerah Kota Kinabalu, di dalam Negeri Sabah, didapati telah menjalankan penyeludupan migrant iaitu sepertimana Lampiran A dan oleh yang demikian, kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 26A Akta Antipemerdagangan Orang dan Antipenyeludupan Migran 2007 ("Akta 670").

Lampiran A reads:

Bil	Name	Age	Gender	Citizenship	Passport No.
1.	Jamilah binti Haji Faisal ("Migrant 1")	55	Female	Filipino	Nil
2.	Fahad bin Jailani ("Migrant 2")	20	Male	Filipino	Nil

Sentence: Be liable to imprisonment for a term not exceeding fifteen years and shall also be liable to fine, or to both.

[2] During the trial, the following witnesses were called to narrate the prosecution's case against the accused. The witnesses called are as follows:

PW1 ASP Bennard Anak Stephen Sambau (Raiding Officer)

PW2 Haslinda bt Hassan (the accused's wife)

PW3 Neil MC Desuil (Civilian)

PW4 Mohd Redzuanzain bin Talip (Immigration Officer)

PW5 ASP Felix Felicianus (ID Parade Officer)

PW6 ASP Janeve Sindih (Investigation Officer – Principal)

PW7 Rozilah binti Kadi (Immigration Officer)

PW8 ASP Yau Wai Peng (Investigation Officer – Secondary)

PW9 Insp. Yunos bin Singa (Malaysia Airport Sendirian Berhad (MASB)'s Auxilliary Police)

PW10 Naley Gadius (MASB's Admin Staff)

PW11 ASP Cisco Anak Garing (Accused's Statement's Recording Officer)

PW12 Insp. Mohd Shafiq bin Kassim (Migrant's Statement's Recording Officer); and

PW13 Insp. Pravin a/l Manisegar (Migrant's Statement's Recording Officer)

[3] At the end of prosecution's case, exh. P2 was amended by two amended charges in exh. P112 (1-2) and exh. P114 (1-2) pursuant to s. 158 of the Criminal Procedure Code ("Act 593") whereby they read as follows:

Exh. P112 (1-2):

That you, on the 4th day of February 2017 between 1000 Hrs till 1430 Hrs, located at Domestic Departure Hall "A", Level 3, Kota Kinabalu International Airport ("KKIA"), in the District of Kota Kinabalu, in the State of Sabah, did carry out smuggling of migrant of one JAMILAH BINTI HAJI FAISAL @ JAMIRAH BINTI HAJI FAISAL (FEMALE) (50 YEAR OLD) (PHILIPPINES/UNDOCUMENTED), and that you thereby committed an offence punishable with under Section 26A of the Anti-Trafficking In Persons and Anti-Smuggling of Migrants Act 2007 ("Act 670") of the Laws of Malaysia.

Exh. P114 (1-2):

That you, on the 18th day of January 2018 between 1201 Hrs till 2054 Hrs, located at Domestic Departure Hall, Level 3, Kota Kinabalu International Airport ("KKIA"), in the District of Kota Kinabalu, in the State of Sabah, did carry out smuggling of migrant of one FAHAD BIN JAILANI (MALE) (20 YEARS OLD) (PHILIPPINES/UNDOCUMENTED) and that you thereby committed an offence punishable with under Section 26A of the Anti-Trafficking In Persons and Anti-Smuggling of Migrants Act 2007 ("Act 670") of the Laws of Malaysia.

The Law

[4] Section 26A of Act 670 reads:

Offence of smuggling of migrants.

Any person who carries out smuggling of migrants commits an offence and shall, on conviction, be punished with imprisonment for a term not exceeding fifteen years, and shall also be liable to fine, or to both.

[5] Section 2 of Act 670, defines smuggling of migrants as follows:

"smuggling of migrants" means:

(a) **arranging, facilitating or organising,** directly or indirectly, a person's **unlawful entry into or through, or unlawful exit from, any country of which the person is not a citizen or permanent resident** either **knowing or having reason to believe that the person's entry or exit is unlawful; and**

A (b) recruiting, conveying, transferring, concealing, harbouring or providing any other assistance or service **for the purpose of carrying out the acts referred to in paragraph (a);** (emphasis added)

[6] Section 2 of Act 670, also defines smuggled migrant as follows:

B "smuggled migrant" means **a person who is the object of the act of smuggling of migrants,** regardless of whether that person participated in the act of smuggling of migrants. (emphasis added)

[7] With regards to the amendment of exh. P112 (1-2) and exh. P114 (1-2), s. 158 of the Criminal Procedure Code (Act 593) reads as follows:

C Court may alter or add to charge.

158(1) Any Court may alter or add to any charge at any time before judgment is pronounced.

(2) Every such alteration or addition shall be read and explained to the accused.

D **[8]** Section 180 of Criminal Procedure Code (CPC) provides:

(1) When the case for the prosecution is concluded, the court shall consider whether the prosecution has made out a *prima facie* case against the accused.

E (2) If the court finds that the prosecution has not made out a *prima facie* case against the accused, the court shall record an order of acquittal.

(3) If the court finds that a *prima facie* case has been made out against the accused on the offence charged the court shall call upon the accused to enter on his defence.

F (4) For the purpose of this section, a ***prima facie* case** is made out against the accused where the prosecution **has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction.**

(emphasis added)

G **[9]** The applicable principle at the close of prosecution case is trite. The court must make a positive evaluation of the prosecution's witnesses' credibility and reliability at the end of prosecution case (*Balachandran v. PP* [2005] 1 CLJ 85). In that case, the Federal Court held that in order to make a finding either way, the court must, at the close of the case for the H prosecution, undertake a positive evaluation of the credibility and reliability of all the evidence adduced so as to determine whether the elements of the offence have been established. In *Magendran Mohan v. PP* [2011] 1 CLJ 805; [2011] 6 MLJ 1, it was held that the test at the end of the prosecution's case is '*prima facie*' test based on a maximum evaluation of evidence where the evidence has to be scrutinised properly and not perfunctorily, cursorily or I superficially. If in a case the prosecution leads two sets of evidence, each one of which contradicts and strikes at the other and shows it to be unreliable, the result would necessarily be that the court would be left with no reliable

and trustworthy evidence upon which the conviction of the accused might be based. Inevitably, the accused would have the benefit of such a situation (*PP v. Lee Eng Kooi* [1993] 2 CLJ 534 at 540; [1993] 2 MLJ 322).

[10] In *Abdullah Atan v. PP & Other Appeals* [2020] 9 CLJ 151, the Federal Court held:

> [44] As to what constitutes 'a *prima facie*' case, the judgment of Vincent Ng J (as he then was) in *PP v. Ong Cheng Heong* [1998] 4 CLJ 209 is instructive. Although *Ong Cheng Heong* (*supra*) was decided prior to the amendment in 2006, we respectfully endorse His Lordship's views, at p. 225:
>
> > What then constitutes a *'prima facie case*'? '*Prima facie*' means *on the face of it or at first glance* ... perhaps the most appropriate definition of 'a *prima facie* case' could be found in the *Oxford Companion of Law* (p. 987), which has it as: "A case which is sufficient for an answer. While *prima facie evidence is evidence which is sufficient to establish a fact in the absence of any evidence to the contrary, but is not conclusive"*. It would follow that there should be *credible evidence on each and every ingredient of the offence. Credible evidence is evidence which has been filtered and which has gone through the process of evaluation. Any evidence which is not safe to be acted upon, should be rejected.*
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> At p. 224, His Lordship said:
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> > ... to me, *maximum evaluation* simply means *evaluation, on a prima facie basis, of each and every essential ingredient of the charge as tested in cross-examination*. In other words, maximum evaluation connotes quantitative rather than qualitative evaluation of the evidence; with *focus more on the evidential burden* in terms of evidence led, *rather than the persuasive burden* in terms of qualitative degree of proof.
> >
> > (emphasis added)

[11] It is based on the above principles that this court must evaluate the prosecution's evidence to determine whether they are credible evidence to establish a *prima facie* case against the accused on the amended charges.

[12] The first amended charge will be dealt first.

[13] The followings are the essential elements of the first amended charge which must be proved by the prosecution:

(i) That Jamilah binti Haji Faisal @ Jamirah binti Haji Faisal ("Jamilah") was a smuggled migrant; and

(ii) The accused had arranged, facilitated or organised, directly or indirectly Jamilah's unlawful exit from Sabah on 4 February 2017 between 10am until 2.30pm at Domestic Departure Hall "A", Level 3, Kota Kinabalu International Airport ("KKIA").

(iii) The accused knowing or having reason to believe that Jamilah's entry or exit is unlawful.

[14] In *PP v. Sumon Khan & Anor* [2018] 1 LNS 1506, the Court of Appeal held:

> [22] To establish the offences committed by the Accused persons, the prosecution has to prove that:
>
> (i) there was "smuggling of migrants" under section 2 of the Act;
>
> (ii) there was common intention between the 1st Accused, 2nd Accused and Sivasankar to smuggle the migrants using illegal and unlawful means.

Contentions, Evaluation And Findings

Failure To Prove "Smuggling Of Migrant" Acts

[15] Section 2 of ATIPSOM defines "smuggling of migrants" as:

> (a) arranging, facilitating or organizing, directly or indirectly, a person's **unlawful entry into or through, or unlawful exit from, any country** of which the person is not a citizen or permanent resident either knowing or having reason to believe that the person's entry or exit is unlawful.
>
> (emphasis added)

[16] The prosecution contends that the accused was involved in a smuggling syndicate and on 4 February 2017, the accused was helping or facilitating Jamilah to exit Kota Kinabalu, Sabah to visit her family in Kuala Lumpur. The *modus operandi* of the smuggling syndicate is to arrange or facilitate or organise through their agent for illegal or unlawful migrants or foreigners to travel by air from KKIA to Kuala Lumpur or to other towns in Sabah. The agent would arrange and work with airport security personnel, usually an auxiliary police officer and/or an immigration officer stationed at KKIA to allow the migrant "easy passage" to Kuala Lumpur or other towns in Sabah for an agreed fee.

[17] The defence submitted that from the evidence adduced by the prosecution, the accused never committed any of the acts mentioned in s. 2 above. In other words, there is no evidence to prove that the accused smuggled Jamilah unlawfully or illegally into any part of Malaysia or out of Malaysia either knowing or having reason to believe that the person's entry or exit is unlawful.

[18] Jamilah's statement (exh. P107 p. 2) shows that Jamilah had entered Malaysia in the 1960s and grew up in Sabah. Thus, the defence contends that Jamilah had entered into Malaysia on her own free will and was not smuggled. If the migrants came to Malaysia by themselves freely and voluntarily, that clearly indicates that they were not smuggled into Malaysia (*PP v. Tin Hock Wan* [2016] 6 CLJ 126 at para 21). The accused was not involved at all with the entry of Jamilah into Malaysia in the 1960s as there is no evidence to prove so.

[19] In the present case, there is no evidence to show that the accused had facilitated the unlawful entry through Sabah of Jamilah. The evidence adduced by the prosecution shows that Jamilah entered Sabah from the Philippines in the 1960s and grew up in Sabah. Thus, Jamilah was already entered and remained in Sabah, Malaysia long before the date of her detention at KKIA on suspicion of possession of a fake MyKad (identity card) on 4 February 2017 (the incident).

[20] Unlike Fahad's case where two boarding passes (exh. P89 and P90) were tendered in evidence, no boarding pass was tendered in court to support the prosecution's contention that Jamilah was going to Kuala Lumpur to visit her family on 4 February 2017. No explanation was given by the prosecution for their failure to tender the boarding pass.The prosecution relied on exh. P107 (Jamilah's cautioned statement dated 5 November 2018) and exh. P75 (Jamilah's deposition dated 12 April 2019) to prove that Jamilah was attempting to go to Kuala Lumpur. For the reasons given below, this court gave little weight to exhs. P107 and P75. Even if this court were to accept the evidence in exhs. P107 and P75, it is clearly stated in Jamilah's cautioned statement and deposition that the agent named Muram gave her a ticket to Kuala Lumpur ("memberikan saya tiket kapal terbang ke Kuala Lumpur, MyKad palsu"). It is the prosecution's case that the role of the accused is to allow Jamilah to pass through the Domestic Departure Hall A unchecked and proceed to the immigration counter where the boarding pass and MyKad are supposed to be checked. The failure to produce the air ticket or boarding pass to Kuala Lumpur gives rise to a reasonable doubt as to the actual destination of Jamilah on the 4 January 2017 and which airline and flight number she was supposed to check-in and board.

[21] Assuming that Jamilah was really intending to exit Kota Kinabalu, Sabah to Kuala Lumpur to visit her family, the purported destination is still within Malaysia. By according a plain and ordinary meaning to the words in the definition of "smuggling of migrants" in s. 2 ATIPSOM, the words "an exit from, any country" means to leave the country (Malaysia). Hence, travelling from KKIA, Kota Kinabalu to Kuala Lumpur does not constitute an exit from, any country (ie, Malaysia) of which a person (ie, Jamilah) is not a citizen or permanent resident. In *PP v. Sumon Khan* [2018] 1 LNS 1506, the Court of Appeal held:

> [63] As far as the 2nd Accused's role is concerned, it was merely confined to looking after the said 13 Bangladeshis in Sibu including purchasing the flight tickets to KLIA from Sibu, Sarawak and it does not involve facilitating or arranging for unlawful entry or unlawful exit of the said 13 Bangladeshis, into or out of Malaysia. *At Sibu, Sarawak, the 13 Bangladeshis were already in Malaysia and when they flew to KLIA they were not exiting Malaysia. Hence the essential element of the offence of smuggling of migrants, that*

A *is to arrange the said Bangladeshis to enter and exit Malaysia, is not made out against the 2nd Accused* because his role, as instructed by Sivasankar, was to assist while the said 13 Bangladeshis were in Sibu only. *He was never involved in cross border or international smuggling.* (emphasis added)

[22] In the present case, Jamilah was already in Sabah, Malaysia before
B 4 February 2017. She entered Sabah from the Philippines in the 1960s. When Jamilah was arrested on 4 February 2017 at the Kota Kinabalu International Airport, she was allegedly taking a domestic flight from KKIA to Kuala Lumpur to visit her family and was not exiting Malaysia. Hence, one of the essential elements of the offence of smuggling of migrants that is
C arranging or facilitating the said Jamilah to enter and/or exit Malaysia is not made out against the accused. The accused was not involved in cross-border or international smuggling. The accused's alleged role is only to allow Jamilah to pass through Domestic Departure Hall A, Level 3, KKIA (easy passage) and proceed to the immigration counter where an accomplice from the Immigration Department was supposedly lying in wait. The accomplice
D would allow her to easily pass through the immigration counter and to proceed to the departure gate and board the flight when it is ready for boarding. See *PP v. Sumon Khan & Anor* (above). On this finding alone, the court could acquit the accused person of the offence he was alleged to have committed in the amended first charge. In case I have erred in my finding
E on the element of smuggling of migrants, I will consider the other contentions and evidence concerning the amended first charge.

[23] The defence contends that it was not the accused who let Jamilah pass through Domestic Departure Hall A, Level 3 at KKIA on 4 February 2017 between 10am until 2.30pm. This is because on 4 February 2017 between
F 8am until 3pm, the accused was in charge of the x-ray machine at Domestic Departure Hall A, Level 3 at KKIA. The accused could have not checked Jamilah when she passed through Domestic Departure Hall A because female passengers were checked by female officers which at the material time was Sjn PB Mastali. If a male officer did check Jamilah, it must have been
G Konst PB Azlan who was also there at the time. Although PW9 said that the accused could check the boarding pass and personal documents of passengers, it does not mean he did such checking. There must be evidence of such action. The defence contends that such evidence can only be obtained from Konst PB Azlan and Sjn PB Mastali. But they were not called as witnesses
H by the prosecution.

[24] Exhibit P105 (Jadual Tugas Syif (AVSEC) Unit Keselamatan) shows that on 4 February 2017 between 0800 hrs to 1500 hrs, the accused was on duty at Domestic Departure Hall A together with two other auxiliary police officers namely, Sgt PB Mastali and Const. PB Azlan. PW9 (Insp Yunos bin
I Singa), the AVSEC shift leader in charge of the day shift on 4 February 2017 testified that on that day the accused was the person in charge of the X-ray machine located at level 3 of Balai Berlepas Domestic A. The X-ray machine

is to scan the passenger's luggage. (See p. 408 of NOP lines 10528-10542). The accused can also do body check. Sgt Mastali and Const. PB Azlan would do the body check and also check the boarding pass and passenger's personal documents. (See p. 410 of NOP lines 10573-10594). Sjn Mastali is female and Const. Azlan is male. (See p. 411 of NOP lines 10611). They are to check the passenger's luggage. They don't check the boarding pass and passenger's personal documents but they could move around doing other task. Sjn Jasnih would check the luggage at the check-in counter, if there is unchecked luggage, they will re-check the luggage. (See p. 413 lines 10651-10666). Under cross-examination, PW9 agreed that on 4 February 2017, the female passengers passing Balai Domestik A will be body-checked by female officers. On 4 February 2017, the female officer available was Sgt PB Mastali. The checking of boarding pass and personal documents was only to check both documents tally. (See p. 417 of NOP lines 10765-10775). Under re-examination, PW9 re-affirmed that female passenger's body can only be checked by the female officer. (See p. 419 of NOP line 10812). From my observation of his testimony in court, I find PW9 to be a reliable and truthful witness and his evidence is credible and unchallenged.

[25] From the unchallenged evidence of PW9 who was the accused's shift leader on 4 February 2017, the duty of the accused was to scan and check passenger's luggage and not to check the boarding pass and personal documents. For female passengers such as Jamilah, she must be body-checked by a female officer, ie, Sjn PB Mastali. The evidence of PW9 has cast lurking doubts as to whether it was Sjn Mastali or Const. PB Azlan or the accused who let Jamilah pass through Domestic Departure Hall A on 4 February 2017. The failure to call Sjn PB Mastali or Const. PB Azlan to clarify or dispel such doubts has left material gaps in the prosecution's evidence. As the prosecution has led two sets of contradictory evidence which shows that there are persons other than the accused who may have let Jamilah pass through Balai Domestik A on the day of the incident, the benefit of the doubt should be given to the accused. See *PP v. Lee Eng Kooi* (above).

[26] As the importance of identification in this case represents a significant part of the proof of guilt in an offence and the identification parade was conducted on 5 December 2018 some 22 months after the date of the incident involving Jamilah on 4 February 2017, I have cautioned myself of the dangers of such evidence where its reliability is seriously disputed. The prosecution contends that there is nothing doubtful about the identification by Jamilah by photographs or other methods such as by conducting an identification parade. The prosecution relied on s. 21 of the Security Offences (Special Measures) Act 2012 which provides:

> 21. Evidence of the **identification of an accused** or other person **prior to the trial shall be admissible as evidence** even though the **identification was by photographs or other methods** or held in circumstances in which the witness identifying the accused or other person is not visible to such accused or other person. (emphasis added)

[27] Having found that the case against the accused depends wholly or substantially on the correctness of the identification evidence, the next question to ask is whether the identification evidence is of good quality, taking into account the circumstances in which the identification by Jamilah was made. The defence contends that identification of the accused by Jamilah by photograph and identification parade is very suspicious and doubtful. The identification by photograph occurred when the statement was taken on 5 November 2018, and the identification parade was conducted on 5 December 2018. Both identifications must be suspected because over 22 months had elapsed after Jamilah allegedly saw the accused on 4 February 2017. Exhibit 107(2) shows Jamilah merely "passed" the auxiliary policeman whom she identified as the accused:

> … Setelah mendapat dokumen tersebut, saya diarahkan oleh MURAM untuk masuk ke Balai Berlepas melalui seorang Polis Bantuan MAB di pintu pemeriksaan barangan. Saya melepasi pintu pemeriksaan tersebut

[28] In essence, Jamilah's encounter with that auxiliary policeman was only for a very short time; for a mere few seconds. In the circumstances, the defence contends that it is impossible for her to remember his physical features. There is no evidence to show that Jamilah had met or known the accused before the date of the incident. It is pertinent to cite the "*Turnbull* guidelines" as cited by the Court of Appeal in *Tan Kim Hoo v. PP & Another Appeal* [2007] 6 CLJ 557 at para. 9 which adopted and applied the following passage in the judgment of Karthigesu JA in *Heng Aik Ren Thomas v. PP* [1998] 3 SLR 465, at pp. 475-476:

> In adapting the *Turnbull* guidelines for our local system, we have reworked the *Turnbull* guidelines into *the following three-step test.* The *first question* which a judge should ask when encountering a *case against the accused depends wholly or substantially on the correctness of the identification evidence which is alleged by the defence to be mistaken.*
>
> If so, the *second question* should be this. *Is the identification evidence of good quality,* taking into account the circumstances in which the identification by the witness was made? A *non-exhaustive list of factors* which could be considered includes the length of time that the witness observed the accused, the distance at which the observation was made, the presence of obstruction in the way of the observation, *the number of times the witness had seen the accused,* the *frequency with which the witness saw the accused,* the presence of any special reasons for the witness to remember the accused, the *length of time which had elapsed between the original observation and the subsequent identification to the police and the presence of material discrepancies between the description of the accused as given by the witness and the actual appearance of the accused.* In considering the circumstances in which the identification was made, the judge should take note of any specific weaknesses in the identification evidence. If the evaluation of the identification evidence, the judge is satisfied that the *quality of the identification is good,* he may then *go on to safely assess the value of the identification evidence.*

Where the *quality of the identification evidence is poor,* the judge should go on to *ask the third question. Is there any other evidence which goes to support the correctness of the identification?* If the judge is *unable to find other supporting evidence for the identification evidence,* he should then be mindful that a *conviction which relies on such poor identification would be unsafe.* The *supporting evidence* need not be corroborative evidence of the kind required in *R v. Baskerville* [1916] 2 KB 658. What the supporting evidence has to be is evidence that *makes the judge sure that there was no mistake in the identification.*

[29] The defence contends that the application of the *Turnbull* guidelines in the present case would show that:

(i) On the first test, Jamilah could have mistaken the accused with someone else because the accused was in charge of the X-ray machine on 4 February 2017. Since the accused was in charge of the X-ray machine, the only male auxiliary police officer available for checking passengers was Const. PB Azlan.

(ii) On the second test, as submitted earlier, Jamilah only passed through Domestic Departure Hall A and there is no evidence she faced the auxiliary policeman face to face for a minute or more. Thus, she only had a few seconds of encounter with the male officer. In the circumstances, it is very impossible for her to identify that auxiliary policeman. The very short time she had with that male officer makes her identification of the accused by photograph and identification parade in November and December 2018 highly doubtful. With 22 months had gone from 4 February 2017 from the first time Jamilah saw that male officer for a few seconds, it is very unlikely that Jamilah would remember his face.

(iii) On the third test, there is no other evidence to support the identification. Instead, the evidence of PW9 that the accused was in charge of the X-ray machine on 4 February 2017 rebuts Jamilah's statement that the accused was the auxiliary policeman who helped her pass through Domestic Departure Hall A without proper checking. Further, PW4's evidence will show that the accused had nothing to do with Jamilah.

[30] In the premises, the identification of the accused by Jamilah *via* the identification parade evidence is very doubtful. Jamilah too had seen the photograph of the accused prior to the commencement of the identification parade as admitted by PW5 which made her identification of the accused by identification parade bad, improper and unfair:

Q: Refer you to P64 page 3 item 6.1.5. Based on this item, Jamilah binti Haji Faisal had seen the photograph of the accused before the commencement of the ID parade, do you agree?

A: I agree.

[31] It was held in *PP v. Tay Ee Hung* [2016] 4 CLJ 897 as follows about the showing of photograph prior to identification parade:

> [26] I agree with Mr Ram's contention that there was serious flaw in the way the ID parade was conducted. First as testified by PW5 and PW6 that the **purported eyewitnesses were shown with the photograph of the accused** when they were grouped together and briefed before the ID parade was conducted which led to positive identification of the accused.
>
> (emphasis added)

[32] After a careful evaluation of the identification evidence, this court finds that the quality of the identification purportedly made by Jamilah at the Domestic Departure Hall A was not good. Having regard to the fleeting glance or brief encounter when Jamilah passed through the said Domestic Departure Hall A, the identification by photographs and identification parade made some 22 months later is doubtful and weak. Without being shown the accused's photograph before the identification was conducted, it is doubtful whether Jamilah would be able to positively identify the accused. There was no pre-trial description of the accused given by Jamilah. There is evidence from exh. P64 (Borang Kawad Cam dated 5 December 2018) and PW5 (ASP Felix Felicianus) which shows that Jamilah had been shown and seen the accused's photograph before the identification parade *albeit* some uncertainty as to the exact time she was shown such photograph. The evidence obtained from such flawed procedure would have little or no value. In *Jaafar Ali v. PP* [1999] 1 CLJ 410, the High Court held:

> [2] The **absence of a pre-trial description of the accused will reduce the value of the identification in an identification parade and the subsequent identification in court.** In this case, the **identification parade conducted by PW16 had absolutely no weight as PW5 had seen the accused at an earlier occasion at the police station.** The earlier identification amounted to a "confrontation" – where the accused was literally shown to PW5. The **evidence obtained from such procedure had no value at all.**
>
> [2a] The **only proper identification therefore would have been** the **dock identification.** However, given the fact that there was **no pre-trial description** and that the **quality of the identification made at the scene of the crime was not good,** and considering the circumstances in which it was made, **the dock identification was of no value also.**
>
> (emphasis added)

[33] The third question is whether there are other evidence which goes to support the identification. Apart from the Jamilah's identification by being shown photographs and by identification parade, the prosecution relied on the evidence of PW4 and the WhatsApp messages in exh. P74 (1-7) to link the accused to the smuggling of migrants (Jamilah and Fahad). After reading the WhatsApp messages, it appears that the transaction between the accused and PW4 did not relate to Jamilah. This is because the transaction between PW4 and the accused was for the period of 7 March 2018 until 25 July 2018 while the date of offence stated in the amended first charge is 4 February

2017. PW4 did not know Jamilah even after seeing her photograph. PW4 did not even know Jamilah was arrested. The WhatsApp chat in exh. P74 between PW4 and the accused also did not mention Jamilah's name. The said WhatsApp chat is a clear proof that the transaction between PW4 and the accused occurred in 2018 while the first amended charge is about an offence committed in 2017. PW4 himself admitted that it took him six months to accept the accused's offer which was first made in 2018. Hence, PW4's evidence has nothing to do with Jamilah.

[34] This court does not find that there are other evidence which supports the identification by Jamilah. The best evidence would be the CCTV footages recorded on 4 February 2017. PW9 testified on the CCTV recordings as follows:

Q: To your knowledge, is there any CCTV footage recording the passengers passing through the **Balai Berlepas Domestik A** marked as X in P105?

A: Yes.

Q: Who has access to this CCTV footage to your knowledge?

A: SOC (Security Operation Centre).

Q: Is it a centre under Malaysia Airports Berhad?

A: Yes.

Q: Can you name a **person who is in charge of this CCTV?**

A: **Sgt Hisham** and **Corporal Nazri.**

Q: Are you referring to any column in P105?

A: Yes. SOC Corporal Nazri and Sgt Hisham.

Q: Do you know both of them?

A: Yes.

Q: Refer you to P105. Where is it stated SOC Corporal Nazri and Sgt Hisham?

A: (Witness circled the SOC Corporal Nazri and Sgt Hisham with yellow highlighter.)

Q: To your knowledge, is there any CCTV footage recording any events in **Bagasi B Loader** marked as X in P106?

A: Yes.

Q: Who has access to this CCTV footage to your knowledge?

A: SOC (Security Operation Centre).

Q: Is it a centre under Malaysia Airports Berhad?

A: Yes.

A Q: Can you name any **person who is in charge of this CCTV** in P106?

A: **Sgt Hisham** and **Corporal Nazri.**

Q: Are you referring to any column in P106?

A: Yes. SOC Corporal Nazri and Sgt Hisham.

B Q: Do you know both of them?

A: Yes. (emphasis added)

[35] In *See Kek Chuan v. PP* [2013] 6 CLJ 98, the Court of Appeal held:

C [34] It goes without saying that the **non-production of the CCTV footage had disadvantaged or prejudiced the defence and the truth of the prosecution's case could not be verified.** Indeed in a criminal trial, **fairness must be displayed by the prosecution.** And the **concepts of a fair trial and fairness have been recognised by our Malaysian Courts** in *Cheak Yoke Thong v. Public Prosecutor* [1984] 2 CLJ 83; [1984] 1 CLJ (Rep) 87; [1984] 2 MLJ 119; (emphasis added)

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At para. 36:

[36] Now, **s. 114(g) of the Evidence Act 1950 applies to both civil and criminal cases. It operates when a witness is not called** (*Chua Kim Suan v. Ang Mek Chong* [1988] 3 MLJ 231; *Eastern & Oriental Hotel [1951] Sdn Bhd v. Ellarlous George Fernandez & Anor* [1988] 2 CLJ 734; [1988] 1 CLJ (Rep) 50; [1989] 1 MLJ 35; *Guthrie Sdn Bhd v. TransMalaysian Leasing Corp Bhd* [1991] 1 CLJ 9; [1991] 1 CLJ (Rep) 155; [1991] 1 MLJ 33, SC; *Abdullah Zawawi Omar v. PP* [1985] 2 CLJ 2; [1985] CLJ (Rep) 19; [1985] 2 MLJ 16, SC; *PP v. Chew Yoo Choi* [1989] 1 LNS 158; [1990] 2 MLJ 444; and *Jazuli Mohsin v. PP* [1990] 1 CLJ 915; [1990] 2 CLJ (Rep) 165; [1990] 2 MLJ 190), or in a situation, like the present case, **where the CCTV footage which is a piece of material evidence has not been produced.**

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(emphasis added)

[36] In *PP v. Lopatkina Klavdiia* [2017] 1 LNS 2089, the High Court held that:

G [30] It is quite obvious that *PW4 was in a much better position to give evidence as to the CCTV at LTAB and their coverage areas.* The explanation given by PW7 flies in the face of logic and clearly meant to provide an explanation for not producing all the CCTV footages *in toto.* This has *clearly led to a suppression of evidence of the rest of the CCTV footage which could have shown the Accused's reaction from the time she came down from the escalator to her walking to Customs Counter No. 1 and the inspection and examination process* that occurred thereafter. I am of the view that this is a *fit and proper situation to invoke Section 114(g) of the Evidence Act 1950 and to find an adverse inference on the non-production of the full CCTV recordings which were clearly available.* In the circumstances, *an inference favourable to the Accused must be taken. Even if the Court had not found in favour of the Accused on the issue* of identity of the *exhibits, the suppression of the CCTV recordings would have also led to a finding that a prima facie case had not been made out* against the Accused.

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(emphasis added)

[37] In *Wong Soon Choon v. PP* [2016] 2 CLJ 807, the Court of Appeal held: A

> (3) *Without the CCTV footage being produced, the defence was at a disadvantage or prejudiced and the truth of the prosecution's case could not be verified. Had the CCTV been produced, the trial judge would have been in a better position to verify the prosecution's version and in particular SP7 and SP11's evidence.* (para 14) (emphasis added) B

[38] In the instant case, the prosecution did not produce the CCTV footages recorded on 4 February 2017 and 18 January 2018. Neither did the prosecution called Sgt Hisham and/or Corp. Nazri who were at all material times in charge of the CCTV recording of passengers passing through the Balai Berlepas Domestik A to produce the CCTV footage. Had the CCTV C footage been produced, this court would be in a better position to verify the prosecution's version that it was the accused who let Jamilah pass through the Domestic Departure Hall A on 4 February 2017 instead of Sgt PB Mastali or Constable PB Azlan. This court is of the view that the CCTV footage is an important piece of material evidence. The failure to call Sgt D Hisham and/or Corp. Nazri to produce the CCTV footage or to explain the non-production of the same would amount to withholding or suppression of evidence. Thus, this court finds that this is a fit and proper situation to invoke an adverse inference under s. 114(g) of the Evidence Act 1950 on the non-production of the CCTV footage. In the circumstances, the inference E favourable to the accused must be taken.

[39] Further, without the CCTV footage being produced, the truth of the prosecution's case and the veracity of the identification evidence could not be verified. Hence, this court finds that the identification evidence is of little value and it is unsafe to convict the accused by relying on the identification F by Jamilah.

Failure To Prove That Jamilah Was A "Smuggled Migrant" Under Section 2 Of ATIPSOM

[40] The defence contends that there is also a serious reasonable doubt G whether Jamilah was a smuggled migrant as defined under s. 2 of ATIPSOM. The evidence reveals that Jamilah's second husband and daughter are both Malaysians. The fact that the Immigration Department allowed the appeal by Jamilah's second husband and daughter to release Jamilah, despite the Sessions Court's order dated 17 February 2017 ordering Jamilah to be deported (P86(2)), proves conclusively that Jamilah is not a migrant. Jamilah H may not be a Malaysian when she entered Malaysia but considering the facts mentioned above, the defence contends that there is a possibility that she has obtained valid documents to stay in Malaysia. It was held in *Mohamad Roslan Marjo v. PP & Other Applications* [2019] 4 CLJ 648 as follows:

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A [21] As such, can the act of the accused in making those passports be considered as prejudicial to public order? With due respect, I do not think so. How could the issuance of the passport to Malaysian citizen tantamount to be a threat to public order. As submitted by learned counsel for the accused one cannot smuggle Malaysian migrant into Malaysia by issuing Malaysian passport because they are surely not B "migrant". If I may add the definition of "smuggling of migrant" under s. 2 of ATIPSOM involved an element of "unlawful entry" into or through or unlawful exit from any country of which the person is not a citizen or permanent resident. Having been issued a travel document, *albeit* fraudulently, will not make a Malaysian citizen a smuggled migrant under ATIPSOM.

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[41] In the light of this court's finding in paras. 20 to 22 above that there was no cross-border or international smuggling of migrants and Jamilah does not come within the definition of "smuggling of migrants" in s. 2 of ATIPSOM, it follows that Jamilah would also not come within the definition D of "smuggled migrant" or a person who is the object of the act of "smuggling of migrants" as defined in s. 2.

[42] The key evidence relied upon by the prosecution to prove their case are as follows:

(i) Jamilah's deposition (exh. P75);

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(ii) Jamilah's statement taken on 5 November 2018 by PW12 (exh. P107(1-3));

(iii) The accused's cautioned statement (exh. P77(1-5));

(iv) Mohd Redzuan Zain bin Talip's evidence (PW4); and

F (v) The investigating officers' evidence (PW6 and PW8).

Exhibit P75 (Jamilah's Deposition)

[43] The defence contends that exh. P75 is inadmissible because the deposition was taken in contravention of s. 61A of the ATIPSOM. That G section requires the issuance of an order of removal from the Director General of Immigration Department before such deposition can be taken. In the present case, such order of removal was never issued by the Director General of Immigration Department. The Court of Appeal in *PP v. Sumon Khan & Anor* [2018] 1 LNS 1506 held at para. 43 on this issue:

H [43] However, we agree with the learned trial Judge that ID 7 (1-13) cannot be admitted on other grounds, namely:

(a) *Section 61A of the Act also requires that before the depositions of the* Bangladeshis *can be admitted as evidence, there must be an order for removal* of the *Bangladeshis issued by the Director General (DG) of Immigration Department.* In the present appeal, there was *never any order of removal by the DG of* I *Immigration ever produced by the prosecution. The rationale of allowing admissibility of depositions of migrants persons under section 61A of the Act was to cater for situations where the migrants were removed by order of the DG of Immigration and*

hence their presence as witnesses could no longer be procured to support a charge under the Act against Accused persons. Hence the *depositions* (which are *hearsay evidence*) are *allowed* to be admitted. *Without the order for removal, these depositions cannot be admitted.* (emphasis added)

[44] After hearing the objection by the defence and submissions by both parties during the trial, this court found that there was no order of removal of Jamilah issued by the Director General of Immigration Department as required under s. 61A of ATIPSOM. Further, Jamilah was released on 18 June 2019 after an appeal to the Immigration Department by her family members. See p. 308 lines 7939 to 7941. Jamilah was not deported but released to her family members. Hence, this court had admitted the deposition as exh. P75 only for the purpose of showing that that PW6 had received the deposition. Thus, the contents of P75 cannot be relied upon unless it has been proven by the prosecution. PW8 testified that the prosecution attempted to call Jamilah as a witness but failed because the address that was given at Lot 22 in Kampung Pasir Putih does not exist. After considering the evidence of PW8, this court finds that more attempts could have been made to locate Jamilah through her husband and daughter whose identity card number, address and handphone numbers were available to the prosecution. Hence, the contents of P75 have not been proven and could not be relied upon by the prosecution to verify or prove the truth of the prosecution's case.

[45] In any event, exh. P75 does not assist the prosecution's case in relation to the amended first charge. The accused's name was not mentioned in exh. P75. It was stated in Jamilah's deposition that "Setelah mendapat dokumen tersebut, saya diarahkan oleh Muram untuk masuk ke Balai Berlepas melalui seorang Polis Bantuan MAB seperti gambar dilampirkan B di pintu pemeriksaan barangan". Thus, it was Muram who instructed Jamilah to enter the departure hall. Although the accused's picture was attached to the deposition and marked lampiran B, Jamilah did not state that she actually met the accused to gain easy passage from the departure hall to the immigration counter. Jamilah did not state that it was the accused who allowed her to pass through the check point of the departure hall (pintu pemeriksaan) and directed her to proceed to the immigration counter. It appears that it was her agent, Muram who directed Jamilah to enter the departure hall.

Exhibit P107(1-3) (Jamilah's Statement Dated 5 November 2018)

[46] The defence contends that prosecution knew that the contents of Jamilah's deposition are inadmissible. For that reason, the prosecution tendered Jamilah's cautioned statement taken by PW12 (exh. P107(1-3)). That statement does not assist the prosecution because its contents materially contradict with other evidence, ie, the evidence of PW4 and PW9:

A (i) Based on PW4's evidence, the accused allegedly arranged the departure of illegal migrants through middlemen either by the name of Mukhsin or Amir. But in Jamilah's statement, she dealt with a person called Muram. Throughout the trial, none of the prosecution witnesses testified about the identity of Muram. Hence, Jamilah was not connected with
B PW4 and the accused.

(ii) The identification of the accused by Jamilah *via* photograph is highly doubtful as submitted earlier.

[47] The defence contends that identification of the accused by Jamilah *via*
C the identification parade is also bad and improper because the said identification parade was held in breach of the accused's right to counsel and against the law. The investigating officer, PW6, knew from the very beginning of the case that since the offence under s. 26A ATIPSOM is defined as a serious offence under the Security Offences (Special Measures) Act 2012 ("SOSMA"), the period of investigation is restricted to 28 days.
D The period of investigation was from 25 October 2018 until 21 November 2018. PW6 knew well that the accused was represented by a lawyer during the proceeding on 30 November 2018 because PW6 was present in the courtroom when the accused's lawyer informed the Sessions Court Judge that the police should not approach the accused for the investigation purpose as
E the accused had been charged. Yet, PW6 instructed his officer Felix (PW5) to take the accused out from prison for identification parade on 5 December 2018 after the accused had been charged in the Sessions Court. PW6 did not tell PW5 that the accused had already a lawyer. Worst, the police deliberately lied in the identification parade report (exh. P64(1-6)) when they
F stated the accused had no lawyer. This was a clear breach of the accused's constitutional right to counsel and SOSMA. A serious miscarriage of justice had occurred here.

[48] This court has made a finding in para. 39 above that the identification evidence is of little value and unsafe to be used to convict the accused. Thus,
G the same reason and finding would apply to the identification by photograph in exh. P107. Further, the photograph 1-10 purportedly shown to Jamilah and referred to in the question at p. 3 of exh. 107 were not attached to exh. 107. In the answer to the question "Boleh kamu camkan gambar ini?" (Gambar bertanda 1 hingga 10 ditunjukkan) at p. 3 of exh. P107, 12
H photographs were purportedly shown. There is no explanation for the discrepancy which cast doubts as to which and how many photographs were actually shown to Jamilah when exh. P107 was recorded. Therefore, this court could not attach much weight or value to the identification by photograph.

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Exhibit P77(1-5) (The Accused's Cautioned Statement)

[49] The defence contends that the accused's cautioned statement (exh. P77(1-5)) carries no weight because the accused gave it involuntarily. The accused was tortured by the special branch so that he would give that statement. The accused had lodged a police report about the torture.

[50] Although the court had marked the accused's cautioned statement as exh. P77(1-5), the court ruled that it was still subject to the element of voluntariness. This court had specifically held at p. 237 lines 6130 to 6136 of the notes of proceeding that if the prosecution wishes to tender the accused's cautioned statement, it should lead evidence on voluntariness. But the prosecution failed to do so for reasons submitted in next paragraphs.

[51] The accused was detained at Lock-up Headquarters Kepayan which is a different room from the interrogation room. The accused would have to be brought to the interrogation room when he was interrogated. The accused was arrested 24 October 2018 but the statement was taken only on 8 November 2018 (17 days). It was during this 17-day period that the accused was tortured so that he would give his statement to the police. The prosecution did not call any police officers or special branch officers who took care of the accused during the said 17-day detention period to testify whether the accused was tortured or not. Therefore, the defence contends that there is no evidence of voluntariness.

[52] Although PW11 said the accused gave his statement voluntarily on 8 November 2018, that evidence does not prove voluntariness. PW11 was not involved in taking care of the accused during the said 17-day period. PW11 only saw the accused for the first time on 8 November 2018 in the interrogation room No. 6, Special Branch, IPK Sabah. PW11's duty was only to take the accused's statement, and not to take care of the accused during his 17-day detention at Lock-up Headquarters Kepayan.

[53] The fact that the accused refused to sign some documents which the police attempted to get him signed in court prior to the commencement of proceeding in the Sessions Court on 30 November 2018 is a sign of involuntariness. And the fact that the accused immediately lodged a police report about the torture after he was released on bail also indicates that he gave his cautioned statement involuntarily.

[54] The decision in *Goi Ching Ang v. PP* [1999] 1 CLJ 829 at p. 855; [1999] 1 MLJ 507 at p. 527 is relevant on this issue:

> Fairness requires fair trial which, in turn, needs fair procedure. Fair process requires that the legitimate interests of both the prosecution and the defence are adequately provided for. While the police ought to be given a reasonable opportunity to question suspects and accused persons, in its investigation, the accused must also be reasonably protected from the danger of extraction of unreliable statements and of statements (even if

A reliable) by some improper means. Evidence obtained in an oppressive manner by force or against the wishes of an accused person or by trick or by conduct of which the police ought not to take advantage, would operate unfairly against the accused and should in the discretion of the court be rejected for admission. The court should ensure that the standards of propriety in obtaining section 27 information are scrupulously
B followed in police station.

[55] Even if the court disagrees with the above argument, the defence contends that the accused's cautioned statement carries no weight because its contents have nothing to do with Jamilah. The cautioned statement did not mention Jamilah's name and was not about smuggling transaction between
C the accused and PW4 in 2017. The smuggling transaction mentioned therein occurred in April 2018. The last paragraph of P77(3) refers to the transaction between the accused and PW4 in April 2018 in respect of a male Chinese. There is no mention at all about transactions in 2017.

D **[56]** As the issue of voluntariness or otherwise is seriously disputed and the police officer in charge of the detention and care of the accused during his 17 days' detention at Lock-up Headquarters, Kepayan was not called as a witness, there is insufficient evidence for the court to make a finding on the issue of voluntariness or otherwise.

E **[57]** After reading and considering the accused's cautioned statement, this court does not find any mention of Jamilah's name. The smuggling activity mentioned in exhs. P77 occurred in 2018 whereas the alleged smuggling of Jamilah in the amended first charge was on 4 February 2017. There was no mention of one Muram referred to by Jamilah in exh. P75 and P107 as her
F agent who arranged for her easy passage to Kuala Lumpur. Hence, this court is inclined to agree with the submission by the defence that the accused's cautioned statement, exh. P77 carries no weight in relation to the first charge because its contents have nothing to do with Jamilah.

PW4's Evidence (Mohd Redzuanzain bin Talib)

G **[58]** The defence contends that this court should not rely on PW4's evidence because his evidence is not credible and does not support the first amended charge. PW4's evidence had nothing to do with Jamilah. PW4 did not know Jamilah even after seeing her photograph. PW4 did not even know Jamilah was arrested. The WhatsApp chat in exh. P74 between PW4 and the
H accused also did not mention Jamilah's name. The said WhatsApp chat also occurred after the date in the charge (The WhatsApp chat was within the period of 7 March 2018 until 25 July 2018; while the date of offence is on 4 February 2017). PW4 even disagreed that he was involved with the smuggling of Jamilah even if he recognised her.

I **[59]** Although PW4 did mention about transaction in February 2017, that evidence should be carefully considered. PW4 only wanted to save himself from being prosecuted. PW6, admitted this fact:

Put: That PW4 is not being charged for any criminal offence under ATIPSOM because he is the link to connect the accused with this smuggling syndicate and PW4 put all the blame on the accused so that he could escape prosecution. Do you agree?

A: I agree.

[60] Hence, the defence contends that PW4 would say anything in favour of the prosecution, including giving hearsay evidence about the accused, in consideration of him not being prosecuted for any criminal offence as long as he could connect the accused with the smuggling activity. The non-prosecution of PW4 is truly surprising because the police knew about PW4 receiving payment from human smuggling syndicate for smuggling migrants and had committed serious offence under ATIPSOM. PW6's investigation revealed that PW4 had direct contact with the members of the human smuggling syndicate. The court would also note that despite the damage PW4 had done to our nation, he is still given privilege by the Immigration Department. PW4 was only given a warning and he continues to work in the Immigration Department and surprisingly at the Foreign Workers Department. The defence contends that the immunity and privilege that PW4 has received are truly amazing in contrast with his betrayal to our nation. It is humbly submitted by the defence that for reasons submitted above, PW4 is not a credible witness.

[61] In short, the defence contends that PW4's evidence did not connect the accused with the smuggling of Jamilah. His evidence only shows the general involvement of the accused with smuggling activity within the period of 7 March 2018 until 25 July 2018 and PW4 had concocted his evidence to ensure the conviction of the accused in consideration for him of not being prosecuted. The defence submits that the court must dismiss hearsay evidence given by PW4 in his examination-in-chief, cross-examination and re-examination regarding the involvement of the accused with Mukhsin and Amir.

[62] After careful scrutiny of PW4's evidence, this court does not find PW4's evidence to be of assistance to support the prosecution's case under the amended first charge. As stated in the above finding on PW4's evidence and the WhatsApp messages, the WhatsApp messages and PW4's evidence does not connect Jamilah to the smuggling activity as it was referring to transactions which took place in 2018 and did not mention Jamilah. PW4 did not know Jamilah even after seeing her photograph. The amended charges are very specific wherein the accused is charged with smuggling of migrants namely, Jamilah and Fahad. The accused is not charged with a general offence of smuggling of migrants. Further, the credibility of PW4 is doubtful as he admitted that he was involved in smuggling of migrants but was not charged because he could link the accused to the smuggling of migrants and he would put all the blame on the accused to escape prosecution.

A **The Second Amended Charge**

Ingredients Of The Second Amended Charge

[63] The followings are the essential elements of the second amended charge which must be proved by the prosecution:

B (i) That Fahad bin Jailani ("Fahad") was a smuggled migrant; and

(ii) The accused had arranged, facilitated or organised, directly or indirectly Fahad unlawful exit from Sabah on 18 January 2018 between 12.01 noon till 8.54pm at Domestic Departure Hall. Level 3 KKIA.

C (iii) The accused knowing or has reason to believe that Fahad's entry or exit is unlawful.

Uncertainty Over The Crime Scene Location

[64] The defence contends that there is a very important matter relating to
D the crime scene location. Unlike the first amended charge which clearly states the location as "Domestic Departure Hall A Level 3", the second amended charge does not state a specific hall. The second amended charge describes the location as "Domestic Departure Hall Level 3". Based on exh. P106, there are three domestic departure halls at level 3. They are
E Domestic Departure Hall A, Domestic Departure Hall B and Domestic Departure Hall C. Hence, there is uncertainty in the second amended charge. It causes confusion as to which domestic departure hall Fahad had passed through. It also means that the prosecution is doubtful over the exact domestic departure hall in which the accused was stationed when Fahad passed through. In essence, there is reasonable doubt as to the exact crime
F scene.

[65] The undisputed evidence shows that there are three domestic departure halls at level 3 on 18 January 2018 at KKIA. See exh. P106. However, exh. P106 shows that the accused was working at bagasi B loader
G for the day shift from 0800 hrs to 1500 hrs on 18 January 2018. This is confirmed by the accused's shift leader, PW9. See p. 396 of NOP lines 10219 to 10221. Bagasi B loader is not situated at the same place described as Domestic Departure Hall, Level 3. Therefore, the undisputed evidence adduced by the prosecution shows that the accused was not working at Departure Hall, Level 3 on 18 January 2018 and there is a doubt as to the
H exact crime scene or place where Fahad had passed through.

Failure To Prove "Smuggling Of Migrant" Acts

[66] The prosecution relied on PW6 and PW8's evidence and contends that the accused smuggled Fahad unlawfully at KKIA on 18 January 2018. It is
I contended by the defence that from the evidence adduced by the prosecution, the accused never committed any of the acts mentioned in s. 2 ATIPSOM. Essentially, there is no evidence to prove that the accused smuggled Fahad

unlawfully or illegally into any part of Malaysia or out of Malaysia either knowing or having reason to believe that the person's entry or exit is unlawful. The reasons are as follows.

[67] Fahad's statement (exh. P108 p. 2) shows that Fahad had entered Malaysia in 2014 without the assistance of the accused. Hence, the accused was not involved at all with the entry of Fahad into Malaysia in 2014.

[68] It was not the accused who let Fahad pass through Domestic Departure Hall Level 3 KKIA on 18 January 2018 between 12.01 noon till 8.54pm because the accused was never present at the "Domestic Departure Hall Level 3" in that period. On 18 January 2018, the accused was not stationed at any of the three domestic departure halls at level 3 KKIA. Exhibit P106 shows that between 8am to 3pm, the accused was stationed at bagasi B loader. At this station, the accused's duty was to check the passenger's luggage. The accused's duty ended at 3pm. Thereafter, on the same day, from 9pm until 19 January 2018 at 8am, the accused did not work. There is no evidence to prove that the accused was present at any of the domestic departure halls at level 3 on 18 January 2018 from 3pm until 19 January 2018 at 8am. The prosecution did not call those auxiliary police officers who were stationed and working at the domestic departure halls level 3 from 8am of 18 January 2018 until 8am of 19 January 2018 whose names were stated in exhs. P106 and D4(38) as witnesses. In the absence of that evidence, it is submitted by the accused that the prosecution has no evidence to put the accused at the crime scene stated in the second amended charge.

[69] Fahad also did not identify the accused as the auxiliary policeman who let him pass through the domestic departure hall at level 3 KKIA. In fact, Fahad did not say anything in his statement (exh. P108(1-4)) about any auxiliary policeman helping him pass through any domestic departure hall.

[70] Exhibits P76 and P108 show that Fahad came to Sabah, Malaysia from the Philippines in 2014 to work. After spending a few years in Sabah, Fahad was asked by his uncle named Osman to work at Petaling Jaya. On 18 January 2018, Fahad went to KKIA in the afternoon to take a flight to Kuala Lumpur. When he arrived at KKIA, an agent named Omar showed him using his handphone which counter Fahad had to go through and gave him two boarding passes for Malindo and AirAsia flights and a fake red identity card. The Malindo boarding pass is for a 9.05pm flight (flight OD 1001) from Kota Kinabalu to Kuala Lumpur on 18 January 2018 (exh. P89). The AirAsia boarding pass is for a 7.50pm flight (flight No. AK6264) from Kota Kinabalu to Tawau on 18 January 2018 (exh. P90). While waiting at gate B5 for his Malindo flight to Kuala Lumpur, Fahad was questioned by a staff of Malindo on his identity card and was brought to the immigration office for investigation.

[71] The evidence shows that Fahad had entered Malaysia from the Philippines in 2014. The entry was arranged by an agent named Mahdi. Fahad's flight on 18 January 2018 to Kuala Lumpur was arranged by an agent named Omar. The flight from Kota Kinabalu, Sabah to Kuala Lumpur on 18 January 2018 cannot be said to be exiting Malaysia. As Fahad was not exiting Malaysia on 18 January 2018, there was no facilitating or arranging for Fahad's unlawful entry or exit from Malaysia within the meaning of "smuggling of migrants" in s. 2 of ATIPSOM. Hence, the essential element or *actus reus* of the offence smuggling of migrants that is to arrange the said Fahad to enter and/or exit Malaysia is not made out against the accused. See *PP v. Sumon Khan* (above).

The Prosecution's Evidence Is Not Credible To Prove The Second Amended Charge

[72] To prove their case in relation to Fahad as stated in the amended second charge, the key evidence relied upon by the prosecution are as follows:

(i) Fahad's deposition (exh. P76);

(ii) Fahad's statement taken on 30 October 2018 by PW13 (exh. P108(1-4));

(iii) The accused's cautioned statement (exh. P77(1-5));

(iv) Mohd Redzuanzain bin Talip's evidence (PW4); and

(v) The investigating officers' evidence (PW6 and PW8).

The prosecution contends that the above are credible evidence to establish a *prima facie* case against the accused under s. 26A ATIPSOM for smuggling of migrants (Fahad) as set out in the amended second charge.

Exhibit P76 (Fahad's Deposition)

[73] The accused submits that the contents of Fahad's deposition (exh. P76) are inadmissible. This is because the order of removal (P85) was only issued after the deposition was taken. The defence submits that the deposition was taken on 12 April 2019 but P85 did not yet exist because it was only issued on 1 August 2019. This is a breach of s. 61A of ATIPSOM 2007.

[74] Although the order of removal (exh. P85) was only issued after the deposition was taken, this court has admitted the deposition as exh. P76. There does not appear to be a date stated in exh. P76 to show when was the deposition of Fahad taken. Therefore, exh. P76 was admitted into evidence only to show that PW6 had received the deposition. Thus, the contents of P76 must be proven before they can be relied on by the prosecution or the court.

[75] There is no mention of the accused's name or the checking of boarding pass by auxiliary police officers. There is also no identification of the accused by Fahad in the deposition (exh. P76). Hence, this court finds that exh. P76 does not assist the prosecution's case against the accused for smuggling of migrants ie, Fahad as set out in the second amended charge.

Exhibit P108(1-4) (Fahad's Statement Dated 30 October 2018)

[76] The defence submitted that the prosecution knew that the contents of the deposition are inadmissible. For that reason, the prosecution tendered the statement of Fahad taken on 30 October 2018 by PW13 (exh. P108(1-4)). That statement however does not assist the prosecution because his statement at p. 3 of exh. P108 stating that he recognised the accused contradicts with other evidence. Firstly, Fahad could not identify the accused during identification parade. Secondly, the accused was never at any of the domestic departure hall level 3 on 18 January 2018 as submitted earlier.

[77] This court had earlier found that the accused was not working at the Domestic Departure Hall, Level 3 on 18 January 2018 as alleged in the amended second charge but the accused was working at bagasi B loader. See exh. P106. PW9 testified that the work of the accused at bagasi B loader was to check the luggage at the check-in counter. If there is unchecked luggage, they will re-check the luggage. The day shift which the accused had worked on 18 January 2018 was from 8am until 3pm. When Fahad went to the Domestic Departure Hall, Level 3 to take the 9.05pm flight to Kuala Lumpur on 18 January 2018, PW8 (ASP Yau Wai Peng) the secondary investigating officer for this case testified that the accused had clocked out at around 3pm on 18 January 2018. See p. 387 of NOP lines 10247 to 10254. Hence, when Fahad went to Domestic Departure Hall, Level 3, KKIA to take the 9.05pm Malindo flight to Kuala Lumpur on 18 January 2018, the accused had already clocked out and was not at the said bagasi B loader or Domestic Departure Hall, Level 3. The failure of Fahad to positively identify the accused at the identification parade and the evidence of PW8 affirming that the accused had clocked out at 3pm on 18 January 2018 which was six hours before Fahad's intended flight at 9.05pm had left serious gaps in the prosecution's evidence which remain unexplained and cast serious doubts on the prosecution's case against the accused person.

Exhibit P77(1-5) (The Accused's Cautioned Statement)

[78] The defence contends that the accused's cautioned statement (exh. P77(1-5)) carries no weight because the accused gave that statement involuntarily.

[79] Even if the court disagrees with the above argument, the accused's cautioned statement carries no weight because its contents have nothing to do with Fahad. The cautioned statement did not mention Fahad's name. The smuggling transaction mentioned therein occurred in April 2018. The last

paragraph of P77(3) refers to the transaction between the accused and PW4 in April 2018 in respect of a male Chinese. There is no mention at all about transactions in January 2018.

[80] As this court has earlier made a finding in relation to Jamilah that there is insufficient evidence to show that the accused's cautioned statement was made voluntarily or otherwise, the same finding would apply to the same cautioned statement, exh. P77 in relation to Fahad. There is no mention of Fahad or his agent, Omar in exh. P77. The transaction mentioned in exh. 77 was in April, 2018 in respect of a male Chinese. Thus, this court finds that exh. 77 does not assist the prosecution's case on the second amended charge involving Fahad.

PW4's Evidence (Mohd Redzuanzain bin Talib)

[81] The defence contends that the court should not rely on PW4's evidence because his evidence is not credible and does not support the second amended charge. PW4's evidence had nothing to do with Fahad. PW4 did not know Fahad even after seeing his photograph. He did not even know Fahad was arrested. The WhatsApp chat in exh. P74 between PW4 and the accused also did not mention Fahad's name. The said WhatsApp chat also occurred after the date in the charge (The WhatsApp chat was within the period of 7 March 2018 until 25 July 2018; while the date of offence as stated in the charge is on 18 January 2018). PW4 even disagreed that he was involved with the smuggling of Fahad even if he recognised him.

[82] As submitted earlier by the defence, PW4's evidence should be carefully considered. PW4 only wanted to save himself from being prosecuted.

[83] In short, PW4's evidence did not connect the accused with the smuggling of Fahad. His evidence only shows the general involvement of the accused with smuggling activity within the period of 7 March 2018 until 25 July 2018. The defence contends that PW4 had concocted his evidence to ensure the conviction of the accused in consideration for him of not being prosecuted. The court must dismiss hearsay evidence given by PW4 in his examination-in-chief, cross-examination and re-examination regarding the involvement of the accused with Mukhsin and Amir.

[84] As this court had found the credibility of PW4 to be doubtful in relation to Jamilah and for the same reasons given for so finding, the same finding on the credibility of PW4 would apply in respect of Fahad.

Evidence Of The Investigating Officers (PW6 And PW8)

[85] PW6 and PW8 are the investigating officers in this case. The defence contends that the court should not rely on their evidence because their investigation was incomplete and improper. In the light of my findings above, I am of the view that it is unnecessary for this court to consider and

make a finding on the defence contention of improper and incomplete investigation of this case by the investigating officers, PW6 and PW8. The defence submitted that the way the investigation in this case was conducted is improper and incomplete which has breached the constitutional right of the accused to a fair trial. Save that there are material gaps in the evidence adduced by the prosecution which remains unanswered and in the light of my findings on the essential elements of the first and second amended charges above which have not been made out or proven by the prosecution, it is unnecessary for this court to consider and make a finding on this point.

Mens Rea

[86] The third essential element of the amended first and second charges is whether the accused either knowing or having reason to believe that Jamilah and Fahad's entry or exit is unlawful. This is the element of *mens rea* for the offence of smuggling of migrants under s. 26A of ATIPSOM. This court had earlier found that the essential element of smuggling of migrants to exit Malaysia (the *actus reus*) has not been made out against the accused. It follows that the *mens rea* is also not made out by the prosecution.

Conclusion And Decision

[87] After giving a maximum evaluation of all the evidence adduced at the end of the prosecution's case, this court finds with respect that the prosecution has not adduced credible evidence proving each ingredient of the offence of smuggling of migrants under s. 26A of ATIPSOM which if unrebutted or unexplained would warrant a conviction.

[88] Based on the aforesaid reasons, this court finds that a *prima facie* case has not been made out against the accused person. In the circumstances, the accused is discharged and acquitted without calling for his defence.

[89] All documentary exhibits are to be kept by the court. The rest of the exhibit (if any) are to be returned to the prosecution for disposal after the lapse of the appeal period.